No. 14536

IN THE

# United States
# Court of Appeals
## For the Ninth Circuit

BERNARD BLOCH,
*Appellant,*

vs

UNITED STATES OF AMERICA,
*Appellee.*

## BRIEF OF APPELLEE

Resisting Appeal from the United States District Court for the Judicial District of Arizona

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## DESCRIPTIVE STATEMENT OF CASE

### 1. Jurisdictional Statement.

The United States District Court for the judicial District of Arizona had jurisdiction hereof under *Title 18, United States Code, Section 3231,* and the United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction hereof under *Title 28, United States Code, Section 1291.*

## 2. Statutes Violated.

The appellant, Bernard Bloch, was charged, in an indictment containing eight counts, by the grand jury of the Judicial District of Arizona, with the illegal acquisition of and sale of narcotic drugs. The illegal acquisition of drugs was charged under *Section 2554 (g), infra.,* and the illegal sale of narcotic drugs was charged under *Section 2554 (a), infra.* The counts alleging violation of *Section 2554 (g), infra.,* were dismissed in advance of trial (T.R. p. 17).* The defendant was a medical man, an osteopath, and the allegations of the indictment were that the sales of narcotic drugs, above mentioned, were not pursuant to the Treasury Department Order Form, not pursuant to a prescription, and not in the regular course of the professional practice of this doctor (T.R. pp. 3, 6).

For the convenience of the court the following statutes are set forth, in pertinent part, verbatim:

"Section 2554. *Order forms—(a) General requirement.*

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose of the Secretary . . . .

"*(c) Other exceptions* . . . .

"(1) *Use of drugs in professional practice.* To the dispensing or distribution of narcotic drugs to a patient by a physician, dentist, or veterinary surgeon registered under Section 3221 in the course of his professional practice only: *Provided,* that such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed,

*Unless the context indicates otherwise, the letters T.R. refer to **Transcript of Record** in the above numbered and entitled matter, and the numbers immediately after said letters, and numbers without other explanatory matter, indicate the page that is cited in the **Transcript of Record.**

showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in Section 2556.

"(2) *Prescriptions.* To the sale, dispensing, or distribution of narcotic drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under Section 3221: *Provided, however,* that such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further,* that such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556 . . . ."

*Title 26 United States Code, 2554.*

It will be noted that there are referrences, in the statute above set forth, to *Sections 3221 and 2556, Title 26 U.S.C.* It will be further noted that *Section 3221, supra,* refers to *Section 3220, infra.* The last two mentioned Sections relate to *Chapter 27, Internal Revenue Code, Special Occupational Taxes, Narcotics.*

*Section 3221, supra,* requires registration of persons engaging in the Special Occupations designated in *Section 3220; Title 26 U.S.C. Section 3220,* imposes a special tax upon wholesalers, dealers, and physicians who deal in narcotic drugs.

*Section 2555, Title 26 U.S.C.,* requires the keeping of "records, statements" and the making of "returns" and provides further:

" . . . (c) *Returns by registrants of drugs received—(1) Requirement.*

Any person who shall be registered in any internal revenue district under the provisions of section 3221 shall, whenever required so to do by the collector of the district, render to the said collector a true and correct statement or return, verified by affidavit, setting forth the quantity of narcotic drugs received by him . . ."

*Section 2555, supra.*

*Section 2556, supra,* provides in pertinent part:

"*Section 2556. Inspection and copies of returns, duplicate order forms, and prescriptions— (a) Requirements.* The duplicate order forms and the prescriptions required to be preserved under the provisions of section 2554 (c) (2) and (e), and the statements or returns filed in the office of the collector of the district, under the provisions of section 2555 (c), shall be open to inspection by officers, agents, and employees of the Treasury Department duly authorized for that purpose; and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the sale, prescribing, dispensing, dealing in or distribution of narcotic drugs . . ."

*Section 3228, Title 26 U.S.C.* defines narcotic drugs.

### 3. Endeavored Defense.

Several efforts were made by appellant to defend against the accusations of the indictment, the most notable are as follows:

The principal defense seemed to be the accusation, by defendant, at various stages of the proceedings that he was being "prejudiced," together with the assertion that he was being "persecuted" for no good reason (T.R. pp. 122, 164, 166,—long period of investigation—, c. f. *Appellant's Brief, bottom of page 9;* T.R. pp. 167, 169, 154, 155—reference alleged search and seizure—; T.R. 222, c.f. *Appellant's Brief, page 15*—reference questions concerning prior conviction—).

The defendant endeavored a defense, in connection with his allegation that the narcotic agent, Mr. Reynaldo S. Cantu, was one of his patients, that the "morphine-sulphate" was always mixed with "atropine", an alleged antidote (T.R. pp. 82, 84, 85). Even this asserted defense failed to encompass one of the exhibits, or one of the drug sales alleged as crimes in the indictment; this is government's exhibit "6B", *two tablets of dilaudid* (T.R. 57, 58, 106, 108). There is no testimony that the *dilaudid* was mixed with an antidote, nor that this was a "treatment" for any certain disease or alleged sickness.

The third asserted defense concerned the "reasonableness of the alleged search and seizure" (c.f. Motion for Suppression of Evidence, Affidavit, and Schedule of seized property, T.R. pp. 12, 13, 14; testimony—pp. 148, 149, 151-158; reference to warrant for arrest—pp. 161, 163). It will be noted, however, that no item of the "schedule of seized property" (T.R. pp. 14, 15) was admitted in evidence against the defendant. The patient card, allegedly properly a part of Item No. 8 in seized property, which was admitted in evidence, was submitted for evidence by the defendant, himself; it is defendant's exhibit "A" (T.R. pp. 207-209).

**4. Pages of Transchipt of Record upon which Appellee Relies in this appeal.**

Appellee relies, to resist this appeal, on those pages of *Transcript of Record* referred to in *paragraph 5, pages 6 to 12, infra.*

**5. Statement of Facts—Corpus Delicti.**

The appellant, a man of preferred position (T.R. p. 177), and special consideration with special occupational privilege, *Title 26 United States Code, Sections 3220 and 3221,* sold narcotic drugs outside the regular course of professional practice (T.R. pp. 46, 49, 54, 56, 57, 59, 62, 65). With the exception of the first exhibit, government's exhibit "3", all of the norcotic drugs were sold directly to Mr. Reynaldo S. Cantu, a narcotics agent for the Bureau of Narcotics, of the United States Government (T.R. pp. 96, et seq.). Many questions upon cross-examination were directed to the asserted justification that the defendant, himself, believed that he was selling these drugs to a narcotic addict (T.R. p.p. 126, et seq.).

On September 23, 1953, Gilbert Hernandez, government informer, was observed as he went into defendant-doctor's offices, and as he came out; he delivered exhibit "3" to Mr. Cantu, who waited on the street near the doctor's office (T.R. pp. 96, et seq.). Exhibit "3" is morphine solution (T.R. p. 46), one cubic centimeter in volume (T.R. p. 68).

From the 23rd day of September, 1953, until the 19th day of November, 1953, purchases were made of government exhibits:

"3"—September 23, (T.R. p. 96), morphine solution (T.R. p. 46), approximately one cubic centimeter (T.R. p. 46), no quantitative analysis (T.R. p. 73);

"4A"—September 24, (T.R. pp. 100,101), morphine solution (T.R. pp. 51, 54), approximately 10 c.c. volume (T.R. p. 74), containing one-eighth grain of morphine per cubic centimeter (T.R. p. 74), for $40.00 (T.R. p. 101);

"5A"—October 29, 1953 (T.R. p. 103), morphine solution (T.R. pp. 54, 104), 20 c.c. (T.R. p. 68), one-eighth grain of morphine per cubic centimeter (T.R. p. 74), for $30.00 (T.R. p. 105);

"6A"—October 30, (T.R. p. 105, et seq.), morphine solution (T.R. p. 58), 15 c.c. (T.R. p. 67), one-quarter grain morphine per cubic centimeter (T.R. p. 75), in connection with government's exhibit "6B" below, purchased for $40.00;

"6B"—purchased at the same time as exhibit "6A", derivative of opium (T.R. p. 58), two tablets (T.R. p. 106), purchased for $20.00 (T.R. pp. 106, 107);

"7A"—November 10 (T.R. p. 111), morphine solution (T.R. p. 60), 30 c.c. (T.R. p. 67), one-sixteenth grain of morphine per cubic centimeter (T.R. p. 75), for $80.00 (but with a credit for 10 cubic centimeters more (T.R. p. 111);

"8A"—November 16 (T.R. p. 112), morphine solution (T.R. p. 64), 8 c.c. (T.R. p. 67), one-eighth grain of morphine per cubic centimeter (T.R. p. 75), the execution of the credit for 10 c.c. of morphine solution mentioned in reference to "7A", above, which was purchased for $80.00 (T.R. p. 112);

"9A"—November 19 (T.R. p. 113), morphine solution (T.R. p. 65, 66), 20 milliliters, or 20 c.c. (T.R. p. 67), one-eighth grain of morphine per cubic centimeter (T.R. p. 76), sold to agent Cantu for $50.00, of recorded money (T.R. p. 115);

The marked money referred to in reference to government exhibit "9A", and the list of serial numbers of that money comprise government exhibits "10" and "11".

The agent, purchaser of the above mentioned narcotics, was not a patient of the doctor, did not have a government form or form provided by the Secretary of the Treasury for the purchase of narcotic drugs, never had a patient card made out for him, and was not sick (T.R. pp. 100, 129, 130, 150); the purchaser, the agent, never had a medical examination or physical examination by the doctor, defendant (T.R. pp. 108, 150); the purchaser, the agent, did not receive any of the narcotics, pursuant to, and did not and never had a prescription from another doctor which was delivered to the defendant (T.R. p. 118); all of the transactions, above listed, were consummated within the Judicial District of Arizona (T.R. p. 117).

Appellant complains that the aggregate of morphine sulphate or morphine solution in all counts of the indictment, amounts only to "90 cubic centimeters" (p. 14, Appellant's Brief), and that this was extended over a period of two months, and would not satisfy the cravings of an addict. The amounts of morphine solution, mentioned above, more nearly aggregate 106 cubic centimeters, and this court's attention is drawn to the fact that Counts IV and V of the Indictment refer to 30 c.c. of the narcotic drug, and in this case the two sales were upon the 29th and 30th days of October, respectively: The court's attention is further directed to the fact that between November 10th and November 19th, inclusive, a period of ten days, 73 c.c. of morphine sulphate were sold, together with two tablets of dilaudid.

Appellant also complains that this prosecution is the outgrowth of three years of investigation by federal

officers, or that it results "after a vigil of three years to find a single violation" (T.R. pp. 122, 164), *(Appellant's Brief, p. 18)*. We believe this court will take judicial notice that investigative files are opened, in federal offices of investigation, upon the registration of a complaint or complaints, and they are closed after inactivity, in such a file, justifies its closing.

The morphine sulphate solution in the seven respective exhibits was purchased wholesale by the defendant at approximately $1.00 or $1.25 per 30 c.c. bottle (T.R. p. 211).

An additional fact notable, and here stated upon the best search that we could make of the record, is that nowhere does it appear that the defendant-doctor admitted or confessed the crime with which he was charged; notwithstanding this, upon application of defendant, the judge gave the following instruction to the jury, which, for the convenience of the court, is quoted below:

> ". . . If you find beyond a reasonable doubt and to a moral certainty that from the evidence before you under the foregoing instructions that the sales and dispensations charged in the various counts of the indictment to have been made are not lawful, then the next question for your determination is whether or not the defendant can avail himself of the defense of unlawful entrapment.
>
> "The law recognizes two kinds of entrapment, unlawful entrapment, and lawful entrapment.
>
> "Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case.

"On the other hand, where a person already has the readiness and willingness to break the law, (336) the mere fact that government agents provided what appears to be a favorable opportunity is no defense, but is a lawful entrapment. . . ."

*T.R. page 291*

**Concerning Alleged Search and Seizure**

It has been noted that none of the items of *Schedule of Seized Property* (T.R. p. 13) was admitted in evidence. It is also notable, however, that Agent in Charge, Mr. Ross, testified concerning his examination of the patient cards; it is further notable that the appellant put one of the patient cards into evidence (defendant's exhibit "A") (T.R. p. 163). In this connection, Agent Ross testified:

". . . And I told him settle down a little bit, and we requested from him his records, his dispensing records, his narcotics stamp, his narcotics order form, and the narcotics that he had on hand in his hospital stock. We went to the Reception Room and he told me that his dispensing record was kept individually on little 3" x 5" cards on each patient.

"I asked him, and with his permission, I (169) took all of the cards to the office and he found all of his narcotics and gave them to me, and gave me his order forms, and gave me his narcotic stamp, special tax stamp. . . ."

*T. R. page 162.*

And further:

". . . Q. He wasn't antagonistic, then, at this time, about your requesting those things and taking them from his possession?

A. No. He gave them to me.

Q. And you did examine those patient cards, or dispensing records?

A. Yes, I made a compilation of inventory of the narcotics which he had dispensed over the past two years. (170)

Q. And in your examination, did you find a patient card, or a dispensing card for Reynaldo S. Cantu?

A. No, I did not.

Q. Then what did you do with those dispensing records, or patient cards?

A. After I made my calculation, Doctor Bloch came to the office the next morning, and I returned them to him. . . ."

*T.R. pages 162, 163.*

At the time of the search the agents had no search warrant (T.R. pp. 139, 167). The agents had had issued a warrant for the arrest of the defendant (T.R. p. 161). There was evidence that there was no search at all, particularly not a general search (T.R. pp. 162-169). Mr. Welsh, who is quoted in Appellant's Brief, testified on *page 155, Transcript of Record:*

"... Q. Where did you go after you searched Doctor Bloch?

A. Well, I went with Doctor Bloch wherever he went. . . ."

The defendant then was not acting under compulsion.

## *INTRODUCTION TO ARGUMENT*

In *Appellant's Brief,* specifications of errors Nos. I and V are argued together; specification of error No. VI is argued next; specifications of error Nos. II and III are argued together; and specification of error No. IV is argued last. The specifications are therefore, susceptible of classification under four general headings, which are presented in the Appellant's Brief as follows: (1) Unreasonableness of search and seizure, failure to

suppress evidence: (2) Assertion that this case proves "illegal entrapment", as a matter of law: (3) Insufficiency of evidence to connect the defendant with ex-exhibit "3" and exhibit "4A", and alleged failure to prove criminal intent, or wilfullness, in connection with an asserted defense "the regular course of business": (4) Misconduct of the Assistant United States Attorney, in relation to questions on cross-examination concerning prior conviction.

In this brief, if it please the court, may we argue the respective points in the order above mentioned.

## *ARGUMENT ON SPECIFICATIONS NOS. I and V*

(Alleged search and seizure)

Initially, we are at a loss to understand how a cogent assignment of reversible error can be hypothecated upon a failure to suppress evidence which was never identified nor admitted in the case in chief against the defendant-movant. It is admitted, however, that Agent Ross testified concerning the results of his examination of the patients' cards. This was not, however, until after the defendant had opened up the question of the alleged patient card on "Raymond Cantu Portillo", and asked Agent Cantu, on cross-examination, if he would be surprised if there were a card with that name. For the convenience of the court this testimony is contained, with respect to Agent Cantu, on *Page 127 of Transcript of Record,* while the testimony of Mr. Ross, in this connection, is contained on *Page 162 of Transcript of Record.*

**Proposition of Law No. 1:** A duly authorized narcotic agent may testify concerning information gained upon the examination of the patient cards of a doctor, if those

patient cards constitute "dispensing records" relating to the dispensation of narcotics under special tax stamp, where the examination of said dispensing records is incident to a legal arrest of the doctor for a violation of the federal narcotics laws.

In view of the extensive treatment of narcotics, in the sale and distribution thereof, in *Title 26 U.S.C.,* and the regulations imposed upon persons to whom are issued "special tax stamps", it seems that some variation of *Proposition of Law No. 1* is essential to the effectuation of fairly manifested legislative intent.

*Section 2556, Title 26 U.S.C. supra*
(quoted extensively on page 4 hereof)

There was no evidence that the appellant did not state to Mr. Ross that the cards were his only dispensing records. Mr. Ross would examine them as a part of his duty under the statute above stated. If he can not state, in a trial of the practitioner whose cards he examined, that a violation of crime is reflected by those "dispensing records", then it is difficult to understand how the apparent purpose of the Congress of the United States, to regulate dealings in narcotics, is to be effectuated. This, together with other considerations, leads to the conclusion that the testimony concerning information gained from a perusal of the cards was admissible, in any event.

We urge that it was not error to deny motion to suppress evidence, and that it was not error to permit testimony concerning information secured from "dispensing records".

A further consideration is that there was no objection to the testimony of Agent Ross concerning the information he gained from examining the cards (T.R. p. 163).

**Proposition of Law No. 2:** Circumstances regarding repeated purchases of narcotics apparently obtained from defendant, and events relating thereto, may establish probable cause and justify defendant's arrest and search of his premises without a warrant.

The above Proposition of Law is substantially verbatim syllabus No. 1 at *Page 74* of the following decision of the United States Court of Appeals for the Ninth Circuit:

*McFarland vs. United States, 9th Cir. 1933, 65 Fed. 2d74.*

Assuming for the moment for the purposes of argument, that evidence was actually seized, in a search actually had, and that the evidence was actually admitted in the trial of the crime charged; then the above rule of law would justify the denial of the motion to suppress evidence. The *McFarland Case, supra,* is less strong, we feel, in its circumstances justifying a search and seizure, than is the case at bar.

The point we wish to urge is that *not all searches and seizures* are prohibited: The *Fourth Amendment to the Constitution of the United States* prohibits only *unreasonable* searches and seizures. The opinion in the above-mentioned case contains the following:

"The motion to suppress and the overruling of the challenge to the sufficiency of the evidence were properly denied . . . in our opinion, the repeated daily purchase of narcotics, apparently obtained from Appellant and the events leading up thereto, as planned and witnessed by the agents, together with all of the facts disclosed by the record, were sufficient to constitute probable cause and justify the arrest and search. . . ."

*Ibid. at page 75.*

One of the significant circumstances which makes the case at bar a stronger case than the *McFarland Case, supra,* is the fact that in that case all of the sales were made through a man by the name of "Rumbaugh", an informer. In the present case it is notable that the felony was committed in the presence of an officer, the defendant dealing directly with an agent of the Bureau of Narcotics of the Phoenix Office; in this case there was commission of a felony in the presence of an officer within three minutes of the time of arrest (T.R. p. 213).

**Proposition of Law No. 3:** The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest was made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed . . . is not to be doubted.

The above *Proposition of Law No. 3* is a quotation of the pertinent part of the holding in *Agnello vs. United States, 1925, 269 U.S. 20, at page 30.* In that case, the above Proposition of Law was dictum, as is pointed out in the dissenting opinion of the following cited case:

*United States vs. Rabinowitz, 1949, 339 U. S. 56, at page 61.*

The above Proposition of Law is well within the confines of the holding of the majority opinion of the last cited case. So far as we can determine the *Rabinowitz Case, supra,* is still the law (through April, 1955). This case contains a rather complete analysis of the decisions by and through which the above mentioned rule of law has developed:

*c.f. Marron vs. United States, 275 U.S. 192.*

*Trupiano vs. United States, 334 U. S. 699.*

The last mentioned case was overruled, in perinent part, by the *Rabinowitz Case, supra,* in language that is contained on *pages 63, and 64, 339 U.S.*

May we call attention to the fact that the *Rabinowitz Case* also overrules the more pertinent portions of the case, *Go-Bart Importing Co. vs. United States, 1930, 282 U.S. 344,* which is cited by appellant. The *Rabinowitz Case,* majority opinion, seems to represent the law in this field of jurisprudence and justifies search of premises in the immediate control of a defendant legally arrested, and justifies the seizure of the implements of the crime.

Taking the circumstances of the case at bar, in the light most appealing to the motion to suppress evidence and the appellant's specifications of error, the patient cards were "implements of the commission" of the crime alleged: Did not the defendant himself describe them as his "dispensing records", kept in the regular course of business? The jury found that he was in the process of selling narcotic drugs "outside the regular course of his business". Defendant himself offered one of the cards as evidencing the dispensation of narcotic drugs.

We urge that the cards would have been admissible in evidence, and were not subject to the motion to suppress evidence; that the information gained by the agent by examination of the cards was admissible; no error was committed in denial of the motion to suppress, nor in the admission of the evidence.

## *ARGUMENT RESISTING SPECIFICATION NO. VI*

(Entrapment)

**Proposition of Law No. 4:** Where a defendant denies the commission of an offense there is no issue as to

"illegal entrapment", and he is not entitled to an instruction thereon.

The defense, "illegal entrapment", may arise upon the assertion by a defendant that he committed the crime, but that he was induced so to do by illegal actions of government agents. It is the writers understanding that where a defendant denies the commission of an offense an essential element is missing from an alleged defense, "illegal entrapment".

*Bakotich vs. United States, C.A. 9th Cir. 1925, 4 Fed. 2d 386.*

In consonance, however, with the other protections afforded this defendant, characterizing the trial as abundantly fair, the Honorable Trial Court gave an instruction upon illegal entrapment in the case at bar (T.R. p. 291 quoted on pages 9, 10, this Brief).

The Appellant cites no case authority for his proposition that the case at bar was a case where there was "illegal entrapment" as a matter of law. We believe this is because no cogent authority for this proposition is available where facts relating to such a defense are at issue.

**Proposition of Law No. 5:** If the defense, "illegal entrapment", fairly becomes an issue in a criminal case, this issue is for determination by the jury, under appropriate instructions.

*West Federal Digest, Criminal Law, Key No. 739 (1).*

We urge the court that the issue of "illegal entrapment" was not raised in the case at bar. The instruction given, as were all of the instructions, and each of them individually, was abundantly fair to the defendant.

*Sorrels vs. United States, 1932, 287 U.S. 435.*

There was no error in refusal, by the court, to determine, as a matter of law, an "illegal entrapment" in the case at bar: The instruction given on "illegal entrapment" was abundantly fair to the defendant, and no error was committed thereby.

## ARGUMENTS ON SPECIFICATIONS OF *ERRORS NOS. II AND III*

(Alleged failure to identify exhibits with defendant)

Appellant's argument on specifications numbered II and III contains, principally, the bald expression that the Trial Court erred in the denying of the motion for acquittal and the motion for new trial. No citation of legal case authority is contained in that argument *(Appellant's Brief, p. 11 et seq.),* and there are no propositions of law indicating upon what the appellant relies.

**Proposition of Law No. 6:** It is not essential that a government agent testify to personal observation of the handing of narcotic drugs to the purchaser thereof, by a defendant, in a case where the crime charged is the illegal sale of narcotic drugs; circumstantial evidence may identify the narcotic drug with the defendant, for submission of the issues to the jury.

It appears that one of the objections, in the specifications of error above mentioned, is that there was not direct testimony concerning the transfer of exhibit "3" from the defendant to the informer, Gilbert Hernandez. This objection is extended to exhibit "4A". Direct evidence of the transfer is not necessarily essential to the proof of the crime, illegal sale of narcotic drugs.

*McFarland vs. United States, supra.*

Appellant complains of a "studied effort to keep Hernandez from the witness stand" which does not seem to

be fair comment under the circumstances: For example: There is no testimony denying Hernandez's "addiction". It is judicially known, we believe, that narcotic addicts are unreliable. Subsequent filing of affidavit in connection with alleged newly discovered evidence (the irrelevance of which prevented the government from making a full response) raises the question now, as to whether or not the defendant should have put Hernandez on the stand to testify. Defendant admits Hernandez was under subpoena; the record shows he was not dismissed from court. The defendant claims to have known Hernandez for two years: And now he complains that the government should have sponsored the narcotic addict, Gilbert Hernandez.

*c.f. Motion for New Trial, filed Ninth Cir. Court of Appeals, November, 1954. No. 14564.*

We do not understand how Appellant can hypothecate prejudice or error, upon the fact that the government would not subscribe to the testimony of Hernandez. In *Statement of Facts—Corpus Delicti, page 6, This Brief,* we have set forth citations of *Transcript of Record* showing the facts proved constituting the corpus delicti. The evidence seems plenary, and the circumstantial exidence of the transaction with Hernandez, concerning exhibit "3", complete. Certainly the evidence identifying the defendant with exhibit "4A" is complete (c.f. T.R. p. 158). The Transcript of Record shows that after September 23, 1953, the date upon which exhibit "3" was acquired, seven items of narcotic drugs, on six different occasions, were received from the defendant by Agent Cantu. The defendant admits the principal circumstances attending each one of those transfers; his only denial seems to be that each of them was not a sale, but was a gift of narcotic drugs in connection with each of which the recipient donated a pay-

ment to the doctor upon the delinquent account of his alleged brother.

Referring again to *Statement of Facts, this brief, pp. 6-10* we urge the court that there was proof, abundant proof, of the corpus delicti of each of the crimes involved upon each of the sales as alleged in the indictment.

It is notable that the defendant sold 103 cubic centimeters of morphine sulphate, together with two dilaudid tablets, the morphine solution having been purchased at between three and four cents a cubic centimeter (about $4.00, aggregate cost), for the sum of $240.00, between the 23rd day of September, 1953, and the 19th day of Novemver, 1953: This, by itself, indicates the sales were not in the regular course of professional practice.

We urge that no error was committed upon the admission of any of the items of evidence, and that in connection with the sale of each of the items criminal intent, knowledge, and irregularity was proved for submission to the jury. It was not error to deny motion for acquittal; neither was it error to deny motion for new trial.

## *ARGUMENT RESISTING SPECIFICATION OF ERROR NO. IV*

**Proposition of Law No. 7:** A defendant who voluntarily assumes to testify in his own behalf, as any other witness, to test his credibility, may be examined on cross-examination as to prior convictions of crime.

The statement in *Proposition of Law No. 7,* above, seems to be the general rule.

*6 A.L.R. 1626, 1636.*

It is also the rule followed in the Federal Courts:

*Carlton vs. United States, 9th Cir. 1952, 198 Fed. 2d 795,* (narcotics prosecution—prior state court plea of guilty to narcotics misdemeanor).

*Shockley vs. United States, 9th Cir. 1948, 166 Fed. 2d 704,* (murder prosecution—felonies, including murder proved, in face of contention one enough for credibility).

*United States vs. Ugo Rossi, 2nd Cir. 1955, 219 Fed. 2d 612,* (importations and sale of heroin — prior crimes, including misdemeanors, in Italy; defendant opened question on direct examination).

There is authority contrary to the above Proposition of Law; but there is more authority that the general rule, above stated, is to be qualified to permit cross-examination only on crimes involving "moral turpitude", or "constituting felonies", and/or upon crimes not too remote in time.

*103 A.L.R. 363, et seq.*

*6 A.L.R. 1623, et seq.*

This is sometimes called the minority rule, or the *Texas Rule.*

*103 A.L.R., supra.*

It also was, at one time, the rule of the Territorial Courts in the Territorial District of Arizona:

*Lewis vs. Territory, (1900), 7 Ariz. 52, 60 Pac. 694.*

The *Lewis Case, supra,* however, was decided under a particular statute which was construed as authorizing cross-examination only on "all of the facts to which he has testified, tending to his conviction or acquittal . . . ."; the omission from said statute of some such expression as "upon his credibility" was deemed to exclude this subject matter of cross-examination.

More recent decisions, in the State of Arizona, indicate that the general rule is followed in Arizona:

*West vs. State, 1922, 208 Pac. 412,*
(Murder—felonies).

*Hadley vs. State, 1923, 212 Pac. 458,*
(Murder—felony).

*Johnson vs. State, 1928, 264 Pac. 1083,*
(prior convictions of misdemeanor and two felonies proved; subject matter opened up on direct examination).

**Proposition of Law No. 8:** As evidence of credibility, defendant-witness may be cross-examined upon prior conviction of felony, or crime involving moral turpitude, even though conviction is on motion or upon appeal, for the conviction of crime is a verity, until set aside.

The rule of law, first above mentioned, is subject to some disputation. A very extensive line of authority, representatives of which are cited in the following paragraphs, support the rule without equivocation. There is a line of authority that denies the propriety of such a statement of law. The first two cases, hereinafter cited, are Federal Cases, respectively representing each side of this disputation. These cases are also cited in the *Appellant's Brief,* at page 16 thereof.

*Empire Packing Co. vs. United States, C.A. 7th Cir. 1949, 174 Fed. 2d 16.*

*Campbell vs. United States, C.A.D.C. 1949, 176 Fed. 2d 45.*

Upon this point we find only two federal cases, our search encompassing decisions of the federal courts reported in *West's Digest System,* through page 464 of *220 Fed. 2d Reporter.*

The circumstances of the prosecution and the incidents of the principal crime alleged in the *Empire Case, supra,* seem to qualify it more nearly as a case in point with the case at bar, than do the circumstances and incidents of the prosecution in the *Campbell Case, supra.* For example: the *Campbell case,* in principal allegation, involved crimes of violence, assault with intent to commit rape, and simple assault; the *Empire Case* involves an indictment brought for the "filing false claims for government subsidies with the Defense Supplies Corporation", a crime other than a crime of violence, as is the case at bar: Though in both crimes (in the cases referred to) there is necessity of proof of criminal intent, even as there is in the case at bar, still, like the case at bar, in the *Empire Company Case* reliance for conviction is not so principally upon proof of a "quality of mind": In a trial for "assault with intent to commit rape" a defendant is entitled to make argument that the accusation "is easy to make and difficult to defend against", and has been held to be entitled to a jury instruction to that effect, *Campbell, 176 Fed. 2d at page 46,* while the same observation should not be made concerning the crime alleging, as to a doctor, "sale of narcotics not in the regular course of professional practice", as in the case at bar: The verdict in the *Campbell Case* relied upon the *"evidence of two small girls who were the victims of the assualts. . . .",* and the testimony of children of tender years is acknowledged to be entitled to *special considerations,* whereas this special quality is present in neither the *Empire Company Case,* nor the case at bar: The treatment of this subject matter in the *Campbell Case* was dictum, not being necessary to the affirming of the judgment, while the treatment of this subject matter in the *Empire Company Case* was not dictum, but was part and parcel of the basis for the affirmance of the judgment.

The above list of the characteristics of the two cases, which we urge give to the *Empire Company Case, supra,* a greater cogency and force in the consideration of the case now on appeal, is not conceived to be all inclusive, for we feel this court will find other characteristics of that case that make it more pertinent to the circumstances in this case.

There are certain qualities, of the *Campbell Case,* however, which seem to qualify it, in some aspects, as a stronger case than the *Empire Company Case,* in application to the case at bar. One of these is the fact that the *Campbell Case* was tried to a jury, while the *Empire Company Case* was tried to the judge. At most, however, we feel that this only requires that further citations of authority be searched to establish which is the better rule.

There is no dearth of authority, in support of the *Empire Company Case* in decisions of supreme courts of the various states. May we first consider those cases cited on *page 16, Appellant's Brief* to the proposition that cross-examination upon prior convictions, if such are on appeal, is improper and/or constitutes misconduct:

First it should be said that there is no citation in the Appellant's Brief to the proposition that the asking of questions concerning prior convictions, even if on appeal, is "misconduct".

There are two state case citations, only, in Appellant's Brief, page 16, which treat the question with which we are here concerned.

*Jennings vs. State, Texas 1909, 115 S.W. 587.*

*Ringer vs. State, Texas 1938, 129 S.W. 654.*

The second of the last two mentioned cases was a prosecution for receiving and concealing stolen sheep,

in the number of some 600, which allegedly were the property of many persons, and had been allegedly stolen in a neighboring county. The defendant was asked if he had been convicted of a felony of stealing sheep in "Nolan County", to which he answered, "yes," "but it is on appeal". In holding that this line of questioning was improper, and reversing the conviction that had been had in the cited case, the Appellate Court seemed to be concerned, also, that the testimony was to be used as original evidence of his guilt of principal violation.

*Ibid. at page 656.*

It is quite obvious that the testimony concerning "conviction for stealing the sheep", when asked in a prosecution for the "receiving of stolen sheep" would likely be used by the jury as "evidence of guilt in the case" being considered. The same implication does not arise in the case at bar, concerning the questions that were asked. In this case the question was solely for use in testing the credibility of the witness-defendant (c.f. quote, *pages 30, 31,* This Brief). Furthermore, in the case at bar, there was no objection to the questions asked, and the answer was fully explanatory. A particular objection was had in the above mentioned *Ringer Case, supra.*

*Jennings vs. State, Texas 1909, 115 S.W. 587,* was a prosecution for sale of intoxicating liquors and violation of the local option laws. Conviction was had: Appeal was, amongst other things, upon the question as to whether or not the defendant-witness could be questioned "have you not been before convicted of violating the local option law in this very court?" In this case it was held that the testimony might have been used as "original evidence of his guilt", and was therefore held cause for reversal.

*Ibid. page 588.*

Each of these cases is representative of the "Texas Rule," one probably constituting the origin of that rule.

We feel that there is other authority to the proposition that such cross-examination, when the conviction is upon appeal, is improper, than is contained in the above mentioned citations to the two Texas cases. We feel that there is more authority, however, to the contrary; that is that such cross-examination is proper. We cite some of these cases in the following paragraphs, not upon the basis that they are the most cogent authority, but upon the basis that they are those which time and space permit:

In the case of *People vs. Rogers, California 1931, 297 Pacific 294,* it was held:

> "... the defendant having voluntarily testified in his own behalf, it was proper for the prosecution to show, either by his cross-examination or by the record of judgment, that he had theretofore been convicted of a felony. People vs. Soeder, 150 Cal. 12, 21, 87 Pacific 1016. It has been held that a witness may be asked upon cross-examination whether he had been convicted of a felony, where a conviction had been had by verdict of a jury, but sentence had not been pronounced. People vs. Ward, 134 Cal. 301, 66 Pacific 372. *Since such evidence of conviction is only for purposes of impeachment and goes only to the matter credibility of the witness, we see no reason why the mere pendency of appeal should effect the question of the admissability of the impeaching evidence."* (Emphasis supplied) *Ibid. at page 926*

In the case of *In re Abrams, Ohio, 1930, 173 N.E. 312,* appears the following:

> "During the course of hearing after the committee had rested its case, Abrams took the stand in his

own defense, . . . and then it was asked on cross-examination whether or not he had not been *convicted* of a crime of subornation of perjury. This was objected to, and the court overruled the objection, and the writer of this opinion thinks properly, for it tends to bear upon the credibility of the character of the witness. I do not know of any criminal case where a man charged with a crime, who takes the witness stand, cannot be asked on cross-examination whether he has been convicted of a felony . . ."

"*(5) Now the claim is made that, in as much as the case was still pending at that time* in the court of appeals, in the question and the answer to it were improper. We do not think so. Counsel for the accused rightfully did ask and get into the record the fact that case was still pending in the court of appeals but as the record then stood, the accused was convicted of a felony, and this court knows what happened to that case of conviction, for I, myself, wrote the opinion reversing the judgment of conviction . . . .".

*Ibid, at page 314*

We cite one more case to the general proposition.

*Williams vs. State, Oklahoma 1924, 193 Pacific 223.*

We have quoted extensively from opinions of Appellate courts in the States of California and Ohio, which seem to be the best available authority upon the questioned proposition. We urge the court that they represent the majority rule, and the better rule, upon the question of the propriety of cross-examination of a witness-defendant upon prior conviction of crime, where that prior conviction is up on appeal.

We urge this because of the limited use that is being made of the testimony; it is only offered for the purpose of testing credibility. That is the circumstance in the present case.

A further consideration upon which we believe that the federal rule is as stated in *Proposition of Law No. 8,* above, is that the contrary rule is fraught with dangers of mistakes that will result from a usual understanding of the meaning of words. For example, in this case:

The danger was not made apparent to the trial court: He had no opportunity nor cause to rule upon the present question, except after trial and to the discard of several trial days: Counsel for defendant made no objection:

Counsel for the defendant had no thought of an accusation of impropriety, and no thought of an accusation of misconduct, at the time the questions were asked:

*T.R. p. 222*

Then, upon re-direct examination, he further exposed the facts and circumstances concerning the prior conviction:

*T.R. pp. 226 and 227,* (hereinafter set-out, pp. 30-31).

Government counsel was extremely careful of conduct, as is demonstrated by the record as a whole, and did not conceive that the question would be a blemish on an otherwise good record:

This indicates a rather standard or usual interpretation of the words "judgment" or "conviction", whether that interpretation is technically right or wrong. Assuming the rule to be other than we have urged it, *Proposition of Law No. 8,* then this inadvertant mistake, resulting from the usual interpretation of language, would occur more often. A rule of law which does not give full weight to the understanding of persons, generally, particularly when it uses words or terminology with which people, generally, are familiar, is not necessarily the best rule of law.

We urge, therefore, that the above stated Proposition of Law is the better rule, and we further urge that it should be the rule in this case: The cross-examination was neither improper, mis-conduct, nor prejudicial, and no error can be based thereon.

**Proposition of Law No. 9:** Though it may not be the better practice to permit cross-examination of defendant-witness upon prior convictions of crimes, where such prior conviction is under an appeal, slight irregularities or variances which do not affect substantial rights do not require reversal of a verdict and judgment which are justified upon the law and evidence.

The above rule of law, *Proposition of Law No. 9,* is only a restatement of *Rule 52(a), Federal Rules of Criminal Procedure, Title 18, U.S.C.* We urge that this rule is applicable to the facts and law of the present case, even if it is determined that it is improper to question, on cross-examination, a witness-defendant as to prior conviction which is on appeal.

Case authority, for the above mentioned rule, is best represented, for the case at bar, in the federal case above referred to:

*Campbell vs. United States, supra.*

In this case, it will be noted, though irregularity was noted in the opinion, the conviction of the reported case was affirmed, upon the ground that substantial justice had been accomplished.

In the face of the abundant evidence of guilt of the crime charged, in the present case, the repeated sales of narcotic drugs to an undercover agent, and the extensive evidence of circumstances indicating that the sales were not pursuant to professional practice, we urge that the slight deviation, if any this court believes there was in the cross-examination above referred to,

was not of significant proportion. We do not understand how it could be otherwise, in view of the following testimony in court at trial hereof:

". . . . Q. Have you ever been convicted of a felony?

A. Yes, but it is up on appeal.

Q. You answered a question to the Judge concerning what one of these bottles would cost. Which bottle was it, if you will recall?

A. That 30 c.c. vial, any one of those big bottles there.

Q. Any one of the these big bottles like this?

A. Yes.

Q. This bottle would cost you wholesale what?

A. Approximately a dollar, a dollar and a quarter.

Q. Containing, as you have stated, both morphine sulphate, and another companion drug, atropine.

A. That is right.

Q. And you were selling them for twenty or fifty dollars?

A. I was not selling it."

*T.R. p. 222.*

And further:

". . . . Redirect examination.

Q. Doctor Bloch, you stated with reference to a felony. Is that in connection with income tax?

A. Yes, it was.

Q. And you were tried on two charges, is that correct?

A. That is right.

Q. And you were acquitted on the one?

A. That is right.

Q. And you have your case on appeal on (254) the other?

A. That is right.

Q. And how much is involved in that appeal?

A. A thousand dollars.

Q. A thousand dollars. And this is for what year?

A. For the year 1948.

Q. 1948? A. Yes.

Mr. Church: That is all.

Mr. Murlless: No further questions.

(Witness excused.) (255)"

We urge the court, therefore, that the cross-examination questions were not improper, were certainly not mis-conduct, and were surely not prejudicial; that in this connection no reversible error was committed by the Honorable Trial Court.

## CONCLUSION

The evidence of guilt of the crime charged against this defendant seems overwhelming; the acquisition of that evidence was under methods acknowledged to be proper in the detection of narcotic violations and seizure of evidence thereof.

The conduct of the trial was without significant blemish.

The verdict of the jury reflects defendant's guilt, beyond a reasonable doubt.

Trial Court committed no reversible error: Neither in denying motions for suppression, for acquittal, nor for new trial.

Judgment should be affirmed.

Respectfully submitted,

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